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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LARRY OSA OGBOMON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE ELEVENTH CIRCUIT'S JUDGMENT

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QUESTION PRESENTED

Whether 18 U.S.C. § 3583(d) authorizes a district court to order, as a condition of supervised release, that an alien defendant who is subject to deportation be deported and remain outside the United States.

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INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to criminal justice reform and crime prevention efforts. As applied to immigration issues, those efforts have included working to ensure that aliens convicted of crimes are either incarcerated or deported. To that end, WLF has filed briefs in this and other federal courts in cases involving the immigration status of aliens found to have engaged in

criminal and/or fraudulent activities. *See, e.g., Immigration and Naturalization Service v. Yang*, 117 S. Ct. 350 (1996); *Immigration and Naturalization Service v. Elramly*, 117 S. Ct. 31 (1996).

WLF is concerned that insufficient steps are being taken to ensure that deportable aliens who have been convicted of crimes are deported immediately after their release from incarceration. Indeed, this case well illustrates the problem. Despite the district court's entry of a judicial deportation order, the Immigration and Naturalization Service (INS) allowed Petitioner to remain at large in this country for 15 months following his release from federal prison. During that period, Petitioner once again engaged in bank fraud, for which he has once again been sentenced to prison. WLF is concerned that the problem will only grow worse if the Court determines that judicial deportation orders are impermissible under 18 U.S.C. § 3583(d).

WLF is filing this brief with the consent of Petitioner and the United States. Consent letters have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, WLF hereby adopts the Statement of the Case contained in the *amicus curiae* brief filed by attorney Thomas Hungar in support of the judgment below.

In brief, Petitioner Larry Osa Ogbomon is a citizen of Nigeria who is appealing a sentence imposed upon him by the United States District Court for the Northern District of Georgia, following his plea of guilty to charges that he

unlawfully re-entered the United States following deportation, in violation of 8 U.S.C. § 1326. He was sentenced to 16 months' imprisonment, to be followed by a three-year term of supervised release which included, as a special condition, that he be deported. Petition Appendix ("Pet. App.") 2a. Mr. Ogbomon asserts that the district court lacked authority to order his deportation without affording him recourse to procedures set forth in the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*

Mr. Ogbomon's current journey through the American legal system began in 1991. In February 14, 1991, he was convicted in state court in DeKalb County, Georgia on various felony offenses but did not receive a sentence of incarceration. On June 10, 1991, he pled guilty in the U.S. District Court for the Northern District of Georgia to two counts of bank fraud. He received a 14-month prison sentence on August 30, 1991, but was released and deported to Nigeria on November 20, 1991.

On October 12, 1993, Mr. Ogbomon was found to be living in the United States again. On January 18, 1994, he pled guilty to one count of having entered the United States without consent of the Attorney General, after having previously been deported, in violation of 8 U.S.C. § 1326. The presentence report provided him with notice that his sentence might include a deportation order: the probation officer included in the report a recommendation that Mr. Ogbomon, as a condition of supervised release, be deported pursuant to 18 U.S.C. § 3583(d). Presentence Report ("PSR") 10. Mr. Ogbomon did not object to that recommendation, nor did he contest that he was an alien subject to deportation. PSR 12.

The district court sentenced Mr. Ogbomon to 16 months' imprisonment, to be followed by three years supervised release. Joint Appendix ("J.A.") 11-12. As a condition of supervised release, the district court ordered Mr. Ogbomon deported pursuant to 18 U.S.C. § 3583(d). He was directed to "take no action to appeal or resist deportation by the Immigration and Naturalization Service," and if deported, not to "reenter the United States during the term of supervised release." J.A. 12.

Mr. Ogbomon appealed the sentence, contending that the district court lacked authority to enter an order of deportation. On May 5, 1995, the U.S. Court of Appeals for the Eleventh Circuit affirmed. Pet. App. 1a-3a. Relying on its earlier decision in *United States v. Chukwura,* 5 F.3d 1420 (11th Cir. 1993), *cert. denied,* 115 S. Ct. 102 (1994), the Eleventh Circuit held that 18 U.S.C. § 3583(d) authorized district courts to order deportation as a condition of supervised release. The Eleventh Circuit denied Mr. Ogbomon's petition for rehearing and suggestion for rehearing en banc on January 22, 1996. J.A. 17-18.

In the meantime, Mr. Ogbomon had completed his term of incarceration in December 1994 and was released to the custody of the INS. In apparent conflict with the district court's deportation order, the INS thereafter released Mr. Ogbomon on bond. Brief for the United States ("U.S. Br.") 6 n.4. On June 5, 1995, an immigration judge entered a warrant of deportation ordering the INS to arrest and deport petitioner. *Id.* Despite that warrant, and despite the district court's order that he "take no action to appeal or resist any order of deportation" (J.A. 12), Mr. Ogbomon remained at liberty in the United States throughout the remainder of 1995, and he filed a motion

with an immigration judge seeking to reopen his deportation proceedings. *Id.* That motion was denied on February 1, 1996. *Id.*

On March 21, 1996, Mr. Ogbomon was arrested on new federal bank fraud charges. *Id.* at 7 n.5. He pleaded guilty to those charges and was sentenced by the U.S. District Court for the Northern District of Alabama to 24 months' imprisonment, to be followed by five years' supervised release. *Id.* One of the conditions of the supervised release was that he be deported immediately upon completion of his latest term of imprisonment. *Id.*

Following Mr. Ogbomon's arrest on the Alabama bank fraud charges, the district court in the instant case on April 10, 1996 revoked his three-year supervised release (without specifying the grounds therefor) and imposed a sentence of 12 months' imprisonment -- but no new term of supervised release. *Id.* at 6.

Mr. Ogbomon's April 22, 1996 petition for certiorari did not mention that the district court had revoked the three-year supervised release term that included the contested deportation condition. In its brief in response, the United States agreed with Mr. Ogbomon that 18 U.S.C. § 3583(d) does not authorize judicial deportation orders, and it asked that the Court grant the petition, vacate the Eleventh Circuit's judgment, and remand the case for further consideration in light of the United States's

position.[1] The Court granted the petition on October 1, 1996.

SUMMARY OF ARGUMENT

The language of § 3583(d) could not be clearer that district courts are authorized, as a condition of supervised release, to order the deportation of an alien who is subject to deportation. Mr. Ogbomon does not contest that he is an alien and is subject to deportation and thus has no cause to object to the district court's application of the statute to him in this case.

In any effort to discredit the Eleventh Circuit's interpretation of § 3583(d), Mr. Ogbomon and the United States have attempted to attribute to the appeals court a far broader reading of judicial deportation powers under § 3583 than that court actually adopted. The Eleventh Circuit did not hold that § 3583(d) grants district courts the power to issue deportation orders that are enforceable in their own right. Rather, since deportation is to be imposed under § 3583(d) only as a *condition* of supervised release, a district court may respond to violation of that condition only by revoking the supervised release and returning the alien defendant to prison for all or part of the remainder of the term of his supervised release. 18 U.S.C. §

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[1] The United States's position regarding the meaning of 18 U.S.C. § 3583(d) has not been consistent. In *Chukwura*, the United States asserted in March 1993 in the appeals court that § 3583 authorized a district judge to include deportation as a condition for supervised release. The United States adopted the opposite position in response to the certiorari petition filed in *Chukwura*, and it has subsequently adhered to the position that § 3583 merely permits a district court to *recommend* deportation to the INS.

3583(e)(3). Interpreting § 3583(d) in this limited manner eliminates any inconsistency between that statute and 8 U.S.C. § 1252a(d), which also authorizes judicial deportation orders -- but in different circumstances and subject to a different set of procedural rules.

The alternative interpretations of § 3583(d) offered by Mr. Ogbomon and the United States are unpersuasive not only because they do violence to the unambiguous statutory language but also because they would render the statute a dead letter. The purposes that the United States alleges are achieved by § 3583(d) are already fully (and far less ambiguously) achieved by other statutes.

ARGUMENT

I. THE LANGUAGE OF SECTION 3583(d) COULD NOT BE CLEARER THAT DISTRICT COURTS ARE AUTHORIZED, AS A CONDITION OF SUPERVISED RELEASE, TO ORDER THE DEPORTATION OF AN ALIEN SUBJECT TO DEPORTATION

Mr. Ogbomon does not contest that Congress has the constitutional authority to empower courts to issue deportation orders if it chooses to do so. Accordingly, the only issue in this case is whether Congress intended to grant such power to federal district courts when it adopted 18 U.S.C. § 3583(d).

The best indication of congressional intent is, of course, the statutory language itself. When the meaning conveyed by that language is clear, there is no need to resort to other tools of statutory construction. The Court "must presume that a legislature says in a statute what it

means and means in a statute what it says there." *Connecticut National Bank v. Germain,* 502 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States,* 449 U.S. 424, 430 (1981)).

The language of 18 U.S.C. § 3583(d) could not be clearer that district courts are authorized, as a condition of supervised release, to order the deportation of an alien who is subject to deportation. The language at issue states, in its entirety:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

18 U.S.C. § 3583(d).

The statute unequivocally states that a district court, when sentencing a convicted criminal to a term of "supervisory release" (to be served following completion of a term of imprisonment), is authorized to "provide ... that [the criminal] be deported and remain outside the United States," subject to only two limitations. The first limitation is that the defendant must be an alien. Second, (s)he must be "subject to deportation." WLF does not understand Mr. Ogbomon to assert that those two conditions have not been met in this case. Accordingly, § 3583(d) unambiguously authorized the district court to condition Mr. Ogbomon's supervised release on his being deported and remaining

outside the United States during the period of his supervised release.

Section 3583(d) nonetheless places clear limitations on a district court's power to effect compliance with its sentence. It may not, for example, direct a U.S. Marshal to take the defendant into custody and place him on board an international flight; rather, the final clause of § 3583(d) makes clear that any deportation must be carried out under the auspices of the INS. Moreover, § 3583(d) states that deportation is to be imposed only as a *condition* of supervised release, rather than being imposed directly as part of the sentence. Accordingly, if a criminal fails to comply with such a condition of supervised release because (for whatever reason) he is not deported immediately following completion of his prison sentence, the district court may respond by revoking the supervised release and returning the criminal to prison for all or part of the remainder of the term of his supervised release (18 U.S.C. § 3583(e)(3)) -- not by initiating contempt of court proceedings against those responsible for the failure to deport the criminal.

The district court at all times in this case acted within the confines of § 3583(d). As noted above, it is uncontested that Mr. Ogomon is an alien and was "subject to deportation."[2] In imposing deportation as a condition of supervised release, the district court did not attempt to bypass immigration officials; rather, it directed that Mr.

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[2] The term "subject to deportation" in § 3583(d) is, presumably, synonymous with the term "deportable" -- which is defined in 8 U.S.C. § 1251. Mr. Ogbomon is "deportable" on several grounds, including that he entered the United States "without inspection" (§ 1251(a)(1)(B)), and that he was sentenced to confinement in a prison for one year or longer (§ 1251(a)(2)(A)(i)(II)).

Ogbomon was to "depart the United States when ordered to do so" by the INS. J.A. 12. When, in April 1996, the district court learned that Mr. Ogbomon had failed to comply with numerous conditions of his supervised release (including the condition that he be deported), it acted appropriately by revoking the supervised release -- rather than by attempting to effectuate immediate deportation.[3]

The various alternative interpretations of § 3583(d) offered by Mr. Ogbomon and the United States fail to explain much of the wording of that statute. More importantly, § 3583(d) would serve no apparent purpose if interpreted as Mr. Ogbomon and the United States have suggested. Only the interpretation adopted by the district court -- an interpretation that relies on the plain meaning of the statutory language -- renders § 3583(d) something more than mere surplusage.

A. Petitioner's and the United States's Interpretation of § 3583(d) Fails to Explain the Language Authorizing Deportation as a Condition of Supervised Release

While Mr. Ogbomon and the United States argue strenuously that § 3583(d) should not be interpreted as authorizing a district court to order deportation as a condition of supervised release, they have been unable to articulate a plausible alternative interpretation. All

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[3] The district court did not specify its grounds for revoking Mr. Ogbomon's supervised release (which began in December 1994 following completion of his prison sentence). Nonetheless, the district court's awareness that Mr. Ogbomon had violated the "deportation" condition of his supervised release suggests that that violation was factored into the district court's revocation decision.

proposed alternative constructions would rob § 3583(d) of any force and thus violate the cannon of statutory construction that Congress intends each provision of a statute to have meaning.

Mr. Ogbomon and the United States contend that § 3583(d) was intended to make clear that the INS may deport an alien criminal even while he is serving a term of supervised release. They argue that in the absence of § 3583(d), deportation by the INS might be regarded as inconsistent with "supervised" release, since it would be virtually impossible for probation officers to supervise released criminals after they have been deported from the country. U.S. Br. 18-19; Brief for Petitioner ("Pet. Br.") 9-10, 21-22. The most obvious deficiency in that argument is that it does not comport with the statutory language; there would have been no reason for Congress to empower *a district court* to "provide, as a condition of supervised release, that [an alien defendant] be deported" if its intent was to empower *the INS* to deport an alien defendant during a term of supervised release.

Moreover, as the United States acknowledges (U.S. Br. 19), Congress adopted a provision empowering the INS to deport alien defendants serving a term of supervised release, *at the very same time* that it enacted § 3583(d). The Sentencing Reform Act of 1984, Pub. L. No. 98-473, which first enacted § 3583(d), also amended 8 U.S.C. § 1252(h), § 242(h) of the INA, to provide that an alien criminal serving a term of supervised release was not exempt from deportation by the INS. As amended, § 1252(h) provided:

> An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated

> by the release of the alien from confinement. Parole, *supervised release*, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

8 U.S.C. § 1252(h). Section 1252(h) states unambiguously that supervised release is not an impediment to deportation by the INS. Accordingly, Mr. Ogbomon's and the United States's proposed interpretation of § 3583(d) would render it essentially meaningless, since (under that interpretation) § 3583(d) would accomplish nothing not already accomplished by § 1252(h). While it is conceivable that Congress might express its intent in two separate places in a statute in order to ensure that its intent was not misconstrued, it is not plausible that it would express that intent so obscurely on a second occasion after having expressed itself so clearly the first time. By enacting § 1252(h), Congress demonstrated its ability to convey unambiguously that the existence of a term of supervised release would have no effect on deportation proceedings. If Congress had intended to drive home that point a second time by enacting § 3583(d), one would have expected Congress to use similarly unambiguous language -- rather than the language actually employed in § 3583(d), which can be made to fit the construction suggested by Mr. Ogbomon and the United States only by application of tortured interpretative reasoning.

The United States suggests one other rationale for § 3583(d) under its limiting interpretation of that statute:

> Section 3583(d) serves the government's purpose of establishing an efficient means of reimprisoning an alien defendant who reenters the United States during such term. In addition to authorizing a district court

> to provide for deportation, Section 3583(d) authorizes a district court to provide that an alien defendant, who is subject to deportation, must remain outside the United States during the period of his supervised release. Consequently, if any such alien defendant reenters the United States, the United States may arrest that alien for violation of a condition of supervised release and reimprison him in accordance with Section 3583(d), without having to pursue a new and independent criminal prosecution under 8 U.S.C. § 1326, for unlawful reentry after deportation.

U.S. Br. 23 n.11. That rationale lends meaning to the second of the two conditions of supervised release authorized by § 3583(d) -- that the alien defendant "remain outside the United States." But it does nothing to lend meaning to the first of the two authorized conditions -- that the alien "be deported." The government's alleged interest in an efficient means of reimprisoning an alien defendant who reenters the country following deportation but before completion of his term of supervised release is in no way served by § 3583(d)'s authorization of deportation as a condition of supervised release.

Finally, several of the courts of appeals that have adopted the United States's limited interpretation of § 3583(d) have concluded that the statute does no more than permit district courts to make a "recommendation" of deportation to the INS. *See, e.g., United States v. Kassar*, 47 F.3d 562 (2d Cir. 1995). That interpretation does not comport with the language of the statute (which contains no wording suggesting that the authorized conditions of supervised release are nonbinding in character) and drains all meaning from § 3583(d) -- since federal judges would be free to recommend the deportation of deportable alien

criminals even in the absence of § 3583(d), and since one would expect the INS to initiate steps to deport deportable alien criminals even in the absence of a nonbinding recommendation from a federal judge.

In sum, those who take issue with the Eleventh Circuit's interpretation of § 3583(d) have failed to articulate a plausible alternative interpretation. Each of the suggested alternatives is inconsistent with the wording of the statute and fails to provide any independent significance to the language authorizing deportation as a condition of supervised release.

B. Section 3583(d)'s "Subject to Deportation" Language Is Rendered Meaningless by Petitioner's and the United States's Interpretation of the Statute

Mr. Ogbomon's and the United States's interpretation of § 3583(d) hinges on their claim that district judges are not empowered to determine whether an alien is "subject to deportation." But that interpretation renders the entire statute meaningless, because a district judge will never or virtually never be in a position to invoke the statute if (s)he is not permitted to determine who is "subject to deportation."

Section 3583(d) states that "[i]f an alien defendant is subject to deportation," a district court may take certain actions, including imposing deportation as a condition of supervised release. In other words, unless there is a finding that the alien defendant is "subject to deportation," § 3583(d) is inoperative and a district judge may not take the steps outlined therein. If, as Mr. Ogbomon and the United States contend, district judges are not empowered to

determine who is "subject to deportation," the question arises how a district judge imposing sentence in a criminal case could ever invoke § 3583(d) -- even for such limited purposes as ordering that the defendant be delivered to the INS following completion of his prison sentence.

> The United States asserts:
>
> Section 3583(d) can only be interpreted as authorizing the sentencing court to provide, as a condition of supervised release, that an alien defendant who is subject to deportation, *i.e.*, an alien *who has been or will be ordered deported* by the Attorney General under the INA, be surrendered to immigration officials for deportation proceedings under the INA.

U.S. Br. 30 (emphasis added). The illogic of the United States's position is readily apparent. For purposes of § 3583(d), the United States defines an alien "subject to deportation" as an alien who either: (1) has been ordered deported; or (2) will be ordered deported by the Attorney General. *Id.* But a district judge preparing to impose sentence in a criminal case will have no way of knowing whether, at some future time, the Attorney General will order the alien defendant deported. Thus, under the United States's view of the statute, the district judge will be in a position to invoke § 3583(d) only in those rare instances in which the alien defendant has already been ordered deported. And of course, under those circumstances, resort to § 3583(d) would be wholly unnecessary in order to ensure that the alien defendant is deported following completion of his prison sentence.

Both the First Circuit and the Tenth Circuit -- which concur with the United States's position regarding the scope

of § 3583(d) -- were forced to engage in circular reasoning in order to explain away § 3583(d)'s "subject to deportation" language. The Tenth Circuit reasoned:

> [Section] 3583(d) can only be interpreted as allowing "the sentencing court to order, as a condition of supervised release, that an 'alien defendant [who] is subject to deportation' be surrendered to immigration officials for deportation proceedings under the [INA] . . . for the purpose of determining whether he is 'an alien defendant . . . subject to deportation.'"

United States v. Phommachanh, 91 F.3d 1383 (10th Cir. 1996)(citing *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991). Neither the First nor Tenth Circuits bothered to explain how a district judge is supposed to determine whether a defendant is among those subject to being surrendered to INS officials by virtue of being "subject to deportation," if (as those courts insisted) only "immigration officials" may determine whether an alien defendant is "subject to deportation."

Mr. Ogbomon objects that the Eleventh Circuit's interpretation of § 3583(d) "invokes an impossible situation because the central requirement that the alien must be 'subject to deportation' involves a determination that the district court lacks jurisdiction to resolve." Pet. Br. 23. He contends that the sole authority to decide who is "subject to deportation" resides with the INS. *Id.* But for the reasons explained above, § 3583(d) is rendered meaningless unless it is interpreted as empowering district courts to determine which alien defendants are "subject to deportation." Section 3583(d) provides district courts with all the "jurisdiction" they need in order to make such determinations.

8 U.S.C. § 1251, which declares certain classes of aliens to be "deportable," provides district courts with adequate guidance to determine which alien defendants are "subject to deportation" for purposes of § 3583(d). An alien defendant is free, of course, to appeal a sentence that includes deportation as a condition of supervised release, on the ground that he was not, in fact, "subject to deportation." But that issue is not present in this case, since Mr. Ogbomon (by virtue of his illegal entry into the country and his history of incarceration) cannot seriously deny that he is "deportable" under § 1251 and thus "subject to deportation" under § 3583(d).

In sum, § 3583(d) will be rendered a dead letter unless it is interpreted as empowering district courts to determine, prior to imposing sentence, whether an alien defendant is "subject to deportation." The interpretation proposed by Mr. Ogbomon and the United States must be rejected because it would deny that power to district courts.

C. No Significance Can Be Attached to Section 3583(d)'s Use of the Word "Provide" Rather Than the Word "Order"

Section 3583(d) states that a district court may, in certain circumstances, "*provide*, as a condition of supervised release that [an alien defendant] be deported . . . ." (emphasis added). Mr. Ogbomon and the United States note that elsewhere in § 3583(d), district courts are empowered to "order" certain other conditions of supervised release. They insist that the use of the word "provide" rather than the word "order" with respect to deportation was an effort by Congress to indicate that district courts could not "order" deportation and that district courts possessed only limited powers when it came to directing

the deportation of an alien as a term of supervised release. Pet. Br. 15-16; U.S. Br. 16-17.

The argument is without merit. The words "provide" and "order" are used interchangeably as verbs in common parlance to convey that the subject of the sentence has issued some sort of directive. No rule of statutory construction requires that distinct meanings be attached to synonyms simply because both are used in the same statute. Mr. Ogbomon erroneously cites *United States National Bank of Oregon v. Independent Ins. Agents,* 113 U.S. 2173 (1993), as supporting such a rule of construction. That case stands for a wholly different proposition: that "identical words used in different parts of the same act are intended to have the same meaning." *United States National Bank,* 113 S. Ct. at 2185. Thus, while one can assume that Congress intended the verb "order" to convey the same meaning each time it was used in § 3583(d), there is no basis for assuming that Congress intended something altogether different when it used the word "provide" in that statute.

In an effort to strengthen their argument that Congress intended discrete meanings for the verbs "provide" and "order," both Mr. Ogbomon and the United States have offered misleading dictionary definitions of the word "provide." Noting that one definition of "provide" is "to exercise foresight in taking due measures in view of a possible event," they suggest that § 3583(d)'s use of the word "provide" in connection with a district court's deportation powers was intended to authorize district courts to set the stage for potential future INS deportations rather than to authorize deportation orders by the district court itself. Pet. Br. 15-16; U.S. Br. 16-17.

The flaw in this resort to dictionary definitions is that Mr. Ogbomon and the United States have supplied one of several definitions of "provide" when used as an intransitive verb, while § 3583(d) quite clearly uses the word "provide" as a transitive verb.[4] One of the dictionary definitions of "provide" when used as a transitive verb ("to state as a condition; stipulate") is quite similar to a definition for the verb "order," as is one of the dictionary definitions of "provide" when used as an intransitive verb ("to make a condition; stipulate"). *See Webster's New World Dictionary* 1145 (2d ed. 1972).

Without regard to the distinction between transitive and intransitive verbs, a straightforward reading of § 3583(d) makes plain that Congress did not intend to use the word "provide" in the sense claimed by Mr. Ogbomon and the United States. If one were intending to "provide" for a *possible* future INS deportation order (in the sense suggested by Mr. Ogbomon and the United States), one would take such foresightful measures as buying a plane ticket. The judicial decree that § 3583(d) permits a district court to "provide" (a decree that an alien defendant's term of supervised release be conditioned on his being deported) simply cannot be viewed as a foresightful measure designed to expedite proceedings in the event of a deportation order by others.

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[4] A transitive verb is one which has an object, while an intransitive verb lacks an object. Thus, "provide" (as used in § 3583(d)) is a transitive verb whose object is the subordinate clause "that [the alien defendant] be deported and remain outside the United States." An example of the use of "provide" as an intransitive verb conveying the meaning cited by Mr. Ogbomon and the United States is found in the Preamble to the Constitution: "to *provide* for the common defense."

D. There Is No Inconsistency Between § 3583(d) As Interpreted by the Court Below and § 1252a(d)

Ten years after adoption of § 3583(d) in 1984, Congress added subsection (d) to § 242A of the INA, 8 U.S.C. § 1252a(d). *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a). Section 1252a(d) provides for entry of judicial deportation orders under specified circumstances. Both Mr. Ogbomon and the United States claim that § 3583(d) as interpreted by the Eleventh Circuit is inconsistent with § 1252a(d), and point to § 1252a(d) as evidence that Congress did not intend to permit § 3583(d) to serve as the basis for judicial deportation orders. U.S. Br. 33-38; Pet. Br. 24.

Those claims are without merit. WLF notes initially that evidence of congressional intent in 1994 is of limited value in determining what Congress intended by its adoption of § 3583(d) in 1984. Section 3583(d) must be interpreted based on the intent of those serving in Congress in 1984 (as conveyed by their chosen statutory language), not based on what those serving in Congress in 1994 thought it might mean.

Moreover, nothing in § 1252a(d) is inconsistent with § 3583(d). Section 1252a(d) provides that in sentencing an alien defendant convicted of certain major felonies, a district court may order the defendant to be deported if requested to do so by the U.S. Attorney with the concurrence of the INS Commissioner. Before any such order is entered, the defendant is entitled to the numerous procedural protection outlined in § 1252a(d)(2).

Mr. Ogbomon contends that the Eleventh Circuit's interpretation of § 3583(d) must be incorrect, because under

that interpretation an alien who had committed major felonies could invoke the numerous procedural protections of § 1252a(d) in fighting deportation, while an alien charged with a minor crime could be deported under § 3583(d) without being afforded those same protections. Pet. Br. 24. As even the United States apparently recognizes, that position is without merit. A district judge may invoke the deportation provisions of § 3583(d) when sentencing *any* alien defendant to a term of supervised release, including felons subject to sentencing under § 1252a(d).

The United States raises a related objection to the Eleventh Circuit's interpretation of § 3583(d). It argues that Congress's adoption of § 1252a(d) with its numerous procedural protections for aliens facing possible judicial deportation would be a "useless act" if § 3583(d) were interpreted as permitting judicial deportation, and "Congress must not be presumed to have performed such a 'useless act' in enacting Section 1252a(d)." U.S. Br. 36-37 (quoting *Phommachanh,* 91 F.3d at 1387.

The Court need not address the applicability to this case of the "useless act" approach to statutory construction, because § 1252a(d) quite clearly applies to situations to which § 3583(d) is inapplicable and thus cannot possibly be described as a "useless act." The most significant difference between the two statutes is the nature of the judicial orders issued under each. Deportation orders issued under § 3583(d) are in the form of conditions imposed on terms of supervised release. If for whatever reason an alien defendant upon whom such a condition has been imposed fails to be deported following the completion of his prison term, the only recourse available to the district court is to revoke the term of supervised release pursuant to 18 U.S.C. § 3583(e)(3). The alien defendant then is re-

incarcerated and serves in prison all or part of his term of supervised release. In contrast, § 1252a(d) appears to contemplate that judicial deportation orders issued under that statute will be directly enforceable.

Another distinction between the two statutes is § 1252a(d)'s greater recognition of the role of the Executive Branch in judicial deportations. As the en banc Eleventh Circuit noted, § 1252a(d) provides Executive Branch with a vehicle for pursuing deportations through a judicial rather than an administrative proceeding, and provides an avenue for appeal (§ 1252a(d)(3)) from any order denying judicial deportation. *See United States v. Oboh,* 92 F.3d 1082, 1087 & n.7 (11th Cir. 1996)(en banc). In contrast, § 3583(d) does not create any formal mechanism by which the United States can seek deportation as a condition of supervised release, nor does it provide for appeal of a denial of such a condition.

Moreover, the existence of § 1252a(d) considerably bolsters the Eleventh Circuit's position that § 3583(d) authorizes district courts to order deportation as a condition of supervised release. Mr. Ogbomon and the United States argue repeatedly that Congress could not possibly have intended the Eleventh Circuit's interpretation of § 3583(d) because Congress has such a long-standing tradition of reserving deportation decisions for the Executive Branch. However, § 1252a(d) is proof positive that regardless of the

strength of any such tradition,[5] Congress is now willing to grant federal courts the authority to issue deportation orders to ensure the quick departure of aliens convicted of crimes. *See also* the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, which was enacted on September 30, 1996 and which (when it takes effect on April 1, 1997) will considerably broaden the power of district courts to issue judicial deportation orders.

In sum, since § 1252a(d) and § 3583(d) can be fully harmonized, the existence of § 1252a(d) does nothing to undercut -- and actually supports -- the Eleventh Circuit's construction of § 3583(d).

II. SECTION 3583(d) AS CONSTRUED BY THE ELEVENTH CIRCUIT DOES NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS

Mr. Ogbomon's certiorari petition did not raise any constitutional issues. Mr. Ogbomon now asserts (as do his two supporting *amicus curiae* briefs) that the Eleventh Circuit's interpretation of § 3583(d) should be avoided because, if adopted, it would raise serious questions as to the constitutionality of § 3583(d). Pet. Br. 25-27.

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[5] Mr. Ogbomon and the United States appear to have overstated their case considerably on this point. Case law they cite in support of their argument that district courts historically have been excluded from the deportation process stands for the proposition that the judiciary has no power to review (unless expressly authorized by law) Executive Branch decisions to *exclude* aliens from the United States, not that Congress has been hostile to the court playing a role in ensuring that undesirable aliens are excluded or deported. *See, e.g., United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 542-43 (1950).

Mr. Ogbomon's constitutional arguments are groundless. His principal argument appears to be that § 3583(d), as construed by the Eleventh Circuit, violates the equal protection component of the Fifth Amendment's Due Process Clause, by improperly distinguishing between classes of aliens. Mr. Ogbomon's contention that those distinctions should be subjected to "strict scrutiny" review (*id.* at 26) is without merit; cases cited by Mr. Ogbomon stand for the proposition that laws distinguishing aliens from citizens are sometimes subjected to strict scrutiny, not that laws distinguishing among different classes of aliens are subjected to such review. *See, e.g., Nyquist v. Mauclet,* 432 U.S. 1 (1977). Mr. Ogbomon's contention that § 3583(d) and § 1252a(d) arbitrarily distinguish among classes of felons by providing the most serious offenders with the most procedural protections against deportation (Pet. Br. 26) is based on a misreading of § 3583(d) and the Eleventh Circuit's decision: § 3583(d) is applicable to *all* alien defendants who are eligible to be sentenced to a term of supervised release, including alien defendants convicted of aggravated felonies.[6]

Mr. Ogbomon lacks standing to assert that § 3583(d) violates procedural due process rights regarding a district court's determinations that the defendant is an alien and is

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[6] The equal protection argument of *amici curiae* American Immigration Lawyers Association, *et al.*, is equally meritless. They argue that alien defendants sentenced within the Eleventh Circuit are denied equal protection because that court's interpretation of § 3583(d) is harsher on alien defendants than are the interpretations of other appeals courts. Brief at 22-24. Such inter-circuit splits regarding the meaning of a statute have never been held to rise to the level of an equal protection violation, and the distinction among defendants that *amici* complain of will be resolved as soon as this Court rules regarding the meaning of § 3583(d).

subject to deportation -- since Mr. Ogbomon does not contest the district court's findings that he is an alien and is subject to deportation. An assertion that district courts are unlikely to provide adequate procedural due process protections during § 3583(d) proceedings is, in any event, highly implausible -- since such proceedings arise in connection with the sentencing phase in a criminal case, an arena in which participants historically have received numerous procedural protections (including, *e.g.*, the right to counsel, the right to notice of potential sentences, the right to present evidence, and the right to appeal any sentence imposed). Such procedural protections more than satisfy the limited procedural due process rights to which aliens are entitled under the Fifth Amendment. *See, e.g., Reno v. Flores,* 113 S. Ct. 1439, 1449-51 (1993).[7]

Mr. Ogbomon is correct that § 3583(d), as construed by the Eleventh Circuit, denies him the opportunity to seek discretionary relief from deportation -- an opportunity normally available in administrative deportation proceedings. However, he has cited no case law that so much as suggests that the opportunity to seek such relief is a substantive right protected by the Due Process Clause. Moreover, as noted above, due to district courts' limited powers to enforce their § 3583(d) deportation orders, it is extremely unlikely that an alien ordered deported as a condition of supervised release would end up, for example, being deported to a country where he is likely to suffer political persecution. If an alien defendant demonstrated to the INS a valid asylum claim following a § 3583(d) depor-

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[7] WLF notes that the United States, while accepting Mr. Ogbomon's interpretation of § 3583(d), rejects out of hand his claim that the Eleventh Circuit's interpretation of § 3583(d) raises constitutional concerns. U.S. Br. 36 n.18.

tation order, the INS would likely decline to carry out the deportation, and the district court's sole recourse would be to revoke the term of supervised release pursuant to § 3583(e)(3). And, of course, such an alien defendant would be free to raise his asylum claims in connection with his sentencing proceedings.

III. IF PETITIONER'S CLAIMS ARE MOOT, LOWER-COURT DECISIONS ENTERED IN THIS CASE SHOULD NOT BE VACATED

As noted in the United States's brief, there is a serious possibility that this case was rendered moot by the district court's April 1996 revocation of Mr. Ogbomon's term of supervised release. The district court replaced that term of supervised release with a 12-month prison sentence, and gave no indication that the new prison sentence is to be followed by a new term of supervised release. Revocation of the term of supervised release would appear to revoke all conditions imposed on the supervised release, including the condition that Mr. Ogbomon be deported.

The government has speculated that the district court may have contemplated that the deportation order would survive revocation of the term of supervised release. U.S. Br. 6. However, § 3583(e)(3) imposes strict limits on the additional punishment that may be imposed on a defendant following revocation of his term of supervised release, and it is not at all clear that § 3583(e) permits imposition of a new term of supervised release following revocation of the original term. Since logic suggests that a deportation order imposed as a condition of supervised release would not survive revocation of the term of supervised release, there is little reason to believe that the district court views its deportation order as remaining in force.

Any claim that this case is not moot must rest on the August 29, 1996 sentence imposed on defendant by the U.S. District Court for the Northern District of Alabama. That sentence included, as a condition of supervised release to follow a 24-month term of imprisonment, that Mr. Ogbomon "shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 USC 3583(d)." U.S. Br. 7 n.5. Given that Mr. Ogbomon raises the same objections to that sentence that he raises to the sentence imposed in the instant case, and given that his appeal from the Alabama sentence will have to come through the Eleventh Circuit (which has already rejected Mr. Ogbomon's statutory arguments in this case and would undoubtedly believe itself bound by its decisions in this case, *Chukwura*, and *Oboh* to reject his forthcoming appeal), prudence suggests that the Court rule on the merits of this case despite the apparent absence of a case or controversy between the parties at present. The current split among the courts of appeals regarding the meaning of § 3583(d) is unlikely to disappear on its own, and thus there is every reason to resolve the issue now in connection with a case in which the alien defendant has a very strong personal stake in the resolution of that issue.

If the Court decides to dismiss the case as moot, it should not disturb the decisions issued below by the district court and the Eleventh Circuit. As the Court held recently in *Anderson v. Green*, "[I]n deciding whether to disturb prior judgments in a case rendered nonjusticiable, we have inquired, pivotally, 'whether the party seeking relief from the judgment below caused the [nonjusticiability] by voluntary action.'" *Anderson v. Green*, 115 S. Ct. 1059, 1061 (1995)(quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall*

Partnership, 115 S. Ct. 386, 391 (1994)). If so, then vacatur is inappropriate.

The revocation of Mr. Ogbomon's term of supervised release was brought about by his voluntary actions. Because he voluntarily took actions that violated the terms of his supervised release (including engaging in criminal conduct in Alabama and remaining in the United States following his December 1994 release from prison), Mr. Ogbomon has nobody to blame but himself for the sequence of events that may have led to this case being rendered nonjudiciable. Accordingly, in the event that this case is dismissed on mootness grounds, *Anderson* and *Bonner Mall* dictate that the lower court decisions that were adverse to Mr. Ogbomon not be vacated.

In sum, WLF requests that the court address the merits of this case. But if the court decides to dismiss the case, it should leave intact the lower court decisions.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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